



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/GVA/2013/015

Judgment No.: UNDT/2013/153

Date: 29 November 2013

English

Original: French

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**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** René M. Vargas M.

BOUTIBA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Jérôme Blanchard, UNOG

## Introduction

1. By application filed on 10 April 2013, the Applicant contests the decision not to select her for the post of Human Resources Assistant, G-6 level, Office for the Coordination of Humanitarian Affairs (“OCHA”) in Geneva (“the post”), advertised as job opening No. 12-HRE-OCHA-25975-R-Geneva [O].

2. She requests the Tribunal to rescind the contested decision, order her promotion to the G-6 level, award compensation for the moral damage suffered, and award compensation for the late completion of her performance appraisals for the periods 2010-2011 and 2011-2012.

## Facts

3. On 24 February 2012, the post of Human Resources Assistant, G-6 level, in the Office of the High Commissioner for Human Rights in Geneva, was advertised as job opening No. 12-HRE-OHCHR-23002-R-GENEVA (R), for which both the Applicant and the person selected for the post advertised as job opening No. 12-HRE-OCHA-25975-R-Geneva [O] applied. Following the selection process for the G-6 post in the Office of the High Commissioner for Human Rights, both were placed on the roster of candidates pre-approved for similar functions (“the roster”).

4. On 21 November 2012, the job opening for the OCHA post was advertised in *Inspira*, with a closing date of 21 December 2012. The Human Resources Management Service (“HRMS”), United Nations Office at Geneva (“UNOG”), sent the files of two roster candidates, the Applicant and the person selected (“Mr. F.”), to the Hiring Manager, who at that time was the supervisor of both candidates.

5. The Hiring Manager reviewed the applications of the two roster candidates and, by memorandum of 20 December 2012, recommended Mr. F. to the Chief, Human Resources Section (“HRS”), OCHA, Geneva, for the post advertised as job opening No. 12-HRE-OCHA-25975-R-Geneva [O].

6. By memorandum of 24 December 2012, the Chief, HRS, OCHA, Geneva, transmitted that recommendation to a Senior Human Resources Officer, HRMS, UNOG.

7. By memorandum of 26 December 2012, the Director, Division of Administration, UNOG, submitted the recommendation that Mr. F. should be selected for the post to the Director-General, UNOG, for the final decision. The Director, Division of Administration, UNOG, noted that the OCHA Division had decided to recommend, before the end of the advertising period, one of the two roster candidates for the post.

8. The Director-General, UNOG, selected Mr. F. on 27 December 2012. On 3 January 2013, the Hiring Manager orally informed the Applicant that she had not been chosen.

9. The Applicant filed her request for a management evaluation on 12 February 2013.

10. The Applicant's performance appraisals for the years 2010-2011, 2011-2012 and 2012-2013 were finalized on 1 March 2013, and she received the rating "successfully meets performance expectations" in all three appraisals.

11. The Applicant filed her application with the Tribunal on 10 April 2013 and the Respondent submitted his reply on 15 May 2013.

12. On 17 May 2013, in response to her request for a management evaluation, the Applicant was informed that the contested decision had been confirmed.

13. By Order No. 62 (GVA/2013) of 24 May 2013, the Tribunal requested the Applicant to clarify the remedies she was seeking in her application and, in particular, whether she was requesting that the decision to appoint the selected candidate should be rescinded.

14. On the same day, the Applicant submitted to the Tribunal the reply of 17 May 2013 in which her request for a management evaluation was turned down, together with a copy of her exchanges with the Management Evaluation Unit in

the attempt to reach a negotiated settlement, an attempt which proved unsuccessful.

15. On 27 May 2013, the Applicant submitted some observations in response to Order No. 62 (GVA/2013). On 7 June 2013, the Respondent submitted comments on those observations of the Applicant, in which he emphasized that the settlement negotiations between the Applicant and the Management Evaluation Unit were confidential and should be excluded by the Tribunal.

16. By Order No. 162 (GVA/2013) of 23 October 2013, the Tribunal convoked the parties to a hearing on 20 November 2013.

17. On 24 and 25 October 2013, the Applicant filed additional submissions with the Tribunal. The hearing took place on 20 November 2013, in the presence of the two parties.

#### **Parties' submissions**

18. The Applicant's contentions are:

a. Her name was removed from the roster a week before the job opening was advertised, and she had to exchange several e-mails with *Inspira* in order to have her name restored to the roster;

b. The post required fluency in both English and French; the *Manual for the Hiring Manager on the Staff Selection System* ("the Manual") specifies that "fluency" means being fluent in the four areas of competency in the language, namely, speaking, reading, writing and understanding; the selected candidate is not fluent in French, as is confirmed by his personal history profile, in which he has written that he is "confident" in French in those four areas; his application should therefore have been automatically rejected by *Inspira* as ineligible;

c. She has 18 years of work experience in the United Nations system, including eight as a Human Resources Assistant, OCHA, whereas the selected candidate has only four and a half years of work experience as a

Human Resources Assistant, including three with OCHA, and a total of six years and four months of work experience at the United Nations;

d. The language requirement was subsequently changed, in the course of the post classification, after the post had been filled;

e. In the selection memorandum transmitted to UNOG no comparison was drawn between the two candidates and no reasons were given for the choice made, even though there had been only two roster candidates, both of whom were working in the same unit;

f. Her candidacy was totally ignored;

g. Unlike those of the selected candidate, her performance appraisals were completed only after the position had been filled; since the selected candidate received different treatment, there was discrimination;

h. The injustice she suffered made her ill and caused her psychological harm.

19. The Respondent's contentions are:

a. The transmittal of the candidacy of the selected candidate to the Hiring Manager was justified as the candidate met all the requirements for the post; he had been placed on the roster and had even been selected for another G-6 post, in the Office of the High Commissioner for Human Rights, whose functions and technical nature were similar, and for which the core competencies—education, work experience and language skills—were actually identical to those of the post at issue in the present application; the selected candidate, Mr. F., had rejected the offer for that other post, however, and had therefore been placed on the roster;

b. The post in the Office of the High Commissioner for Human Rights also required a very good knowledge of French, and, during the selection process for the post, the French language skills of the selected candidate were tested; accordingly, in its comparative analysis report, the selection

panel had noted, following an oral question, that the selected candidate was fluent in French; when he applied for the post in the Office of the High Commissioner for Human Rights, the Central Review Panel endorsed his candidacy;

c. The selection exercise for the post in the Office of the High Commissioner for Human Rights resulted in the selected candidate being chosen, and, when he rejected the offer, he was placed on the roster for a post requiring the same level of French as the post at issue in the present case;

d. The Applicant's contention that she was deprived of a chance of being promoted because the candidacy of the selected candidate was reviewed improperly is therefore without merit;

e. The selection procedure provided for in sec. 9.1.4 of the Manual was followed; the Hiring Manager, who knew the two roster candidates, was not required to interview them and to recommend both candidates; it was enough that he should assess the two candidates on paper; the Hiring Manager provided clear reasons for his recommendation;

f. Both the Applicant and the selected candidate met the requirement of a minimum of seven years of work experience, and the fact that the Applicant had 18 years of work experience did not give her the prior right to be promoted;

g. The late completion of the performance appraisals had no effect on the selection procedure; the Hiring Manager was the supervisor of the Applicant and therefore was aware of her performance level; moreover, the performance appraisals of the selected candidate had not been completed either; accordingly, there was no discrimination on the part of the Hiring Manager; the Applicant has not demonstrated that the decision was discriminatory;

- h. The Appeals Tribunal has stated that moral damages may not be awarded unless there is specific evidence to support the award, which the Applicant has failed to provide in the present case;
- i. The fact that the Applicant was informed by the Hiring Manager of her non-selection on the day she had a doctor's appointment was pure coincidence; the intention of the Hiring Manager was to notify the Applicant orally of her non-selection before the information was communicated to her later the same day upon receipt of a copy of the memorandum sent to the selected candidate;
- j. The fact that the job opening was advertised before the post had been formally classified had no influence on the selection; the job opening was based on a previously advertised job opening in the Office of the High Commissioner for Human Rights, and the requirements of administrative instruction ST/AI/2010/3 were met;
- k. The decision was lawful, and the application should be rejected in its entirety.

## **Consideration**

### *Scope of the case*

20. First, the Tribunal has to determine which are the administrative decisions that have been duly challenged before it, in particular those that have been the object of the request for management evaluation pursuant to the following provisions.

21. Staff rule 11.2 provides:

#### Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as

a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

22. It follows from the above provisions that the staff member who submits a request for a management evaluation must specify the administrative decisions, explicit or implicit, which he or she contests.

23. The Applicant, in her request for a management evaluation, contests the decision not to select her for the G-6 post of Human Resources Assistant, OCHA, and requests either that the decision be rescinded or that she be promoted to the G-6 level. In her request for a management evaluation, the Applicant also seeks to be compensated for the psychological damage suffered because of the late completion by her supervisor of her performance appraisals; however, there is no clear contestation by her of a specific administrative decision relating to the late completion. Furthermore, in these proceedings before the Tribunal, the Applicant is solely contesting the decision not to select her for the G-6 post of Human Resources Assistant, OCHA, and while she refers to the late completion of her performance appraisals and seeks compensation for the resulting damage, she does so purely as a ground for contesting the non-selection decision. Consequently, the Tribunal declares that the contesting of the decision relating to her performance appraisals is non-receivable in this case.

24. As to the lawfulness of the selection procedure, the Applicant, in both her submission to the Management Evaluation Unit and her application before this Tribunal, has merely requested the rescission of the decision not to select her for the contested post. Given the lack of transparency in the Applicant's submissions, the Tribunal, by Order No. 62 (GVA/2013) of 24 May 2013, asked her to clarify whether she was also requesting the rescission of the appointment of the selected candidate. The reply of the Applicant failed to provide the necessary details.



25. Consequently, the Tribunal considers that the only request properly before it in these proceedings is the request that the decision not to select the Applicant for the post be rescinded.

*On the merits*

26. The Tribunal must first consider the Applicant's contention that the selection procedure was irregular. The Applicant argues principally that the selected candidate's command of French was not at the level required by the job opening and that he was therefore not eligible for the post.

27. The job opening, as communicated by the Respondent, required candidates to be "fluent" in French and English. The Manual stipulates that if the job opening requires fluency in a language, four areas are involved, namely, writing, speaking, understanding, and reading. Where a job opening merely requires "knowledge" of the language, the Manual stipulates that the person should be "confident" in two of the aforementioned areas.

28. In this instance, the selected candidate stated in his personal history profile that he was "confident" in the areas of writing, speaking, understanding, and reading French. Moreover, the Respondent, in replying to a request made by the Tribunal, confirmed that the selected candidate had been attending a level-four French course in the Staff Development and Learning Section ("SDLS"), UNOG, at the time of his candidacy, and that he had failed the final examination at that level. The Tribunal is in no doubt whatever that a person who is following level four of the SDLS French course, and who is unsuccessful in the end-of-level examination, falls short of the standard of fluency in French that was required by the job opening. Accordingly, the selected candidate did not fulfil one of the conditions required by the job opening in order to be eligible for the post.

29. The Tribunal now has to determine what consequences it should draw from the finding that the level of Mr. F.'s French was inadequate, when earlier, at the time of the interview that had led to his being placed on the roster, the selection panel had found that he was "fluent" in French.

30. Sections 9.4 and 9.5 of Administrative Instruction ST/AI/2010/3/Amend.1 (Staff selection system) provide:

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories and the Field Service category. Following the selection decision, roster candidates shall be retained in a roster indefinitely or until such time the present administrative instruction is amended. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening without reference to a central review body.

9.5 Qualified candidates for generic job openings are placed on the relevant occupational roster after review by a central review body and may be selected for job openings in entities with approval for roster-based recruitment. The roster candidate shall be retained on an occupational roster indefinitely or until such time the present administrative instruction is amended. Should an eligible roster candidate be suitable for the job opening, the hiring manager may recommend his/her immediate selection to the head of department/office/mission without reference to the central review body.

31. The Tribunal considers that when a staff member is placed on a roster of candidates pre-approved for similar functions, this creates a presumption that that staff member is capable of exercising the functions concerned and that he or she meets the eligibility requirements of the post in question. However, the Tribunal considers that it is no more than a presumption and can be invalidated by evidence to the contrary, especially when, as in this case, it is provided by another candidate. To maintain otherwise, that is, to decide that the Tribunal cannot challenge a competency regarded as acquired, would mean that the Tribunal knowingly accepts an error committed by a panel regarding a staff member's linguistic skills, university degrees, and so forth, an error that led to the staff member's wrongful placement on the roster, with continuing consequences, even though in another selection procedure evidence was provided of the roster candidate's inability to meet the eligibility requirements of the job opening.

32. From the foregoing it follows that Mr. F. was not eligible for the post as he did not meet the language requirement and could not therefore be selected.

33. The Applicant also contends that her candidacy was not compared with that of the selected candidate despite the fact that the Administration was under an obligation to select the best candidate. The Respondent maintains that it is clear from the memorandum of 20 December 2012 that the Hiring Manager compared and reviewed the candidacies of the two roster candidates, that is, the Applicant and the selected candidate, and then recommended only one candidate, which was within his discretionary power.

34. Sections 9.4 and 9.5 of Administrative Instruction ST/AI/2010/3/Amend.1, which were cited earlier, provide that the Administration may select someone from the roster, if, after all the candidacies have been considered, it transpires that that person is the best candidate, without being obliged to refer the candidacy of the selected candidate to a central review body.

35. According to the Administration's interpretation, which is set out in greater detail in the Manual, it is permissible, pursuant to sec. 9.4 and 9.5 of Administrative Instruction ST/AI/2010/3/Amend.1, to select a roster candidate without examining the candidacies of other candidates. This Tribunal has already ruled that such an interpretation is unlawful, as it constitutes a violation of the principles of article 101, paragraph 3, of the Charter of the United Nations and staff regulation 4.2 (*Charles*, UNDT/2013/040; *Skourikhine* UNDT/2013/113).

36. Article 101, paragraph 3, of the Charter of the United Nations states:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

37. Staff regulation 4.2 states:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall

be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

38. It has been the consistent jurisprudence of this Tribunal and the Appeals Tribunal that, in accordance with the above principles, every candidate applying for a post at the United Nations is entitled to full and fair consideration. It follows that the Administration cannot merely select a person from a roster of candidates pre-approved for similar functions without examining the candidacies of other eligible candidates, and without comparing the qualifications and competencies of the pre-approved candidate with those of the other eligible candidates, regardless of whether or not those other candidates are on the roster.

39. It is clear from the case file that the entire range of candidacies was not considered. First, the memorandum from the Hiring Manager addressed to the Chief, HRS, OCHA, recommended the selection of Mr. F. on 20 December 2012, yet the vacancy announcement stated that the closing date for the job opening was 21 December 2012. Moreover, the Administration admits that only two candidacies, those of Mr. F. and the Applicant, were considered and those of the other candidates were not. Lastly, while the Respondent contends that the candidacy of the Applicant was considered, there is no documentary evidence to support that contention, even though the fact that the candidacies were from two staff members in his own office should have prompted the Hiring Manager to draw up a written comparison of their respective merits as a matter of course.

40. It follows from the foregoing, first, that the selected candidate was not eligible for the contested post, secondly, that the Administration has not demonstrated that the candidacy of the Applicant was given full consideration. The Tribunal therefore considers that the decision not to select the Applicant and the decision to select Mr. F. were unlawful.

41. The next step is to determine the consequences of those unlawful decisions. As was stated earlier, the Applicant has not requested that the decision to select Mr. F. be rescinded; the Tribunal cannot therefore order this to be done. On the other hand, the Applicant has requested that the decision not to select her be rescinded. In this instance, ordering rescission would be devoid of meaning

because such a ruling by the Tribunal would fail to trigger any action on the part of the Administration. It would make sense to rescind the negative decision concerned only if the decision to select Mr. F. were also set aside, which would mean that the Administration would have to restart the selection procedure. Such is not the case, however, and Mr. F. will remain in post. Since this Tribunal cannot take purely theoretical decisions that create no obligation for the Administration, the Applicant's request that the decision not to select her be rescinded has to be rejected. The same goes for her request to be promoted to the G-6 level, because it is not for the Tribunal to promote a staff member. However, the Tribunal is required to rule on the damage suffered by the Applicant as a consequence of the decisions declared unlawful earlier.

#### *Damage*

42. To determine the material damage suffered by the Applicant, two elements need to be taken into account: the nature of the irregularity committed, and the likelihood that the Applicant would have been selected if the irregularity had not been committed (cf. *Solanki* 2010-UNAT-044; *Mezoui* 2012-UNAT-220; *Appleton* 2013-UNAT-347).

43. In the light of what has been stated above, assuming that the non-eligibility of Mr. F. meant that the Applicant was the only eligible roster candidate, the Hiring Manager would also have had to review the 14 other candidates deemed eligible. The Appeals Tribunal found in *Lutta* 2011-UNAT-117 that there was no established rule for setting compensation for loss of chance of promotion in non-promotion cases, and that the trial court must exercise its discretion in this matter, bearing in mind the facts in each case. In the present case, the Tribunal considers that if the Administration had correctly followed procedure and had compared the candidacies of the remaining 15 eligible candidates, the Applicant, as a roster candidate, had a good chance of being selected. Compensation for material damage should therefore be set at 6,000 Swiss francs.

44. The Appeals Tribunal has also held that moral damage can give rise to compensation, provided that it is supported by specific evidence (cf. *Hastings* 2011-UNAT-109). The irregularities observed by the Tribunal in the selection

procedure have caused the Applicant substantial moral damage; not only has she suffered from headaches and depression but she is currently having to work in the same section as the colleague who was promoted to the post for which she had applied and who, unlike the Applicant, did not meet the eligibility requirements for the post. At the hearing, the Applicant provided information on her resulting frustration, which has adversely affected her life, her well-being at work, and ultimately her health, as evidenced by the medical certificates. The Tribunal considers that there are grounds for awarding the Applicant compensation in the amount of 5,000 Swiss francs for the moral damage suffered.

### **Conclusion**

45. In view of the foregoing, the Tribunal DECIDES:

- a. The Administration is ordered to pay the Applicant the sum of:
  - i. 6,000 Swiss francs for material damage; and
  - ii. 5,000 Swiss francs for moral damage;
- b. The above-mentioned compensation shall bear interest at the United States Prime Rate with effect from the date on which the present judgment becomes executable until the date on which the said compensation is paid. An additional five percent shall be added to the United States Prime Rate 60 days from the date on which the present judgment becomes executable;
- c. All the other requests of the Applicant are rejected.

*(Signed)*

Judge Jean-François Cousin

Dated this 29<sup>th</sup> day of November 2013

Entered in the Register on this 29<sup>th</sup> day of November 2013

*(Signed)*

René M. Vargas M., Registry, Geneva